



UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
www.uspto.gov

BENJAMIN AARON ADLER
ADLER & ASSOCIATES
8011 CANDLE LANE
HOUSTON TX 77071

COPY MAILED

JAN 26 2009

OFFICE OF PETITIONS

In re Application of :
Flock, et al. :
Application No. 10/736,133 : ON PETITION
Filed: December 15, 2003 :
Attorney Docket No. D6462CIP :

This is a decision on the petition to revive under 37 CFR 1.137(a), filed January 5, 2009.

The petition under 37 CFR 1.137(a) is DISMISSED.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)". Extensions of time under 37 CFR 1.136(a) are permitted. No fee is required for a renewed petition.

The above-identified application became abandoned for failure to timely file a reply in response to the non-final Office action mailed March 14, 2008. This Office action set a shortened statutory period for reply of three (3) months. No reply having been received, the application became abandoned on June 15, 2008. A Notice of Abandonment was mailed on November 19, 2008.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR 1.17(1); (3) a showing to the satisfaction of the

Commissioner that the **entire delay** in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) Any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to paragraph (d) of this section. The instant petition lacks item (3).

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable: "The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."¹

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the Manual of Patent Examining Procedure, however, does not constitute "unavoidable" delay.²

Applicants assert unavoidable delay due to Hurricane Ike. According to petitioner, the office of counsel for Applicants underwent mandatory emergency evacuation on September 10, 2008. Petitioner states that they had already drafted a complete response to the Office action by that date, and were awaiting confirmation instruction from Applicants in order to submit the response before September 15, 2008. However, because most of Houston did not have electrical power or postal service until September 22, 2008, Applicants could not submit a response until that time.

As set forth above, 37 CFR 1.137(a) requires a showing that the **entire period** in filing the required reply from the due date for the reply until the filing of a grantable petition was unavoidable. Applicants have not provided such a showing here. Assuming *arguendo* that applicants were unavoidably prevented from filing a reply until September 22, 2008, there has been no showing to support the conclusion that the period from

¹ In re Mattulath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

² See Haines, 673 F. Supp. at 317, 5 U.S.P.Q. 2d at 1132; Vincent v. Mossinghoff, 230 U.S.P.Q. 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 U.S.P.Q. 1091 (D.D.C. 1981); Potter v. Dann, 201 U.S.P.Q. 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

September 23, 2008 to January 5, 2009 was unavoidable.

Alternative Venue and Other Matters:

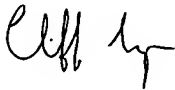
While the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable, petitioner is not precluded from obtaining relief by filing a petition pursuant to 37 CFR 1.137(b) on the basis of **unintentional** delay. A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by (1) The reply required to the outstanding Office action or notice, unless previously filed; (2) The petition fee as set forth in 37 CFR 1.17(m); (3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional; and (4) Any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to paragraph (d) of this section.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
 Commissioner for Patents
 P.O. Box 1450
 Alexandria VA 22313-1450

By FAX: (571)273-8300
 Attn: Office of Petitions

Telephone inquiries related to this decision should be directed to the undersigned at (571)272-3207.



Cliff Congo
Petitions Attorney
Office of Petitions